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## SOME CONSIDERATIONS UPON THE STATE-WIDE INITIATIVE AND REFERENDUM

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Professor Beard has well said that a system of initiative and referendum can be intelligently discussed only with reference to the concrete forms in which it appears. Upon this question as elsewhere much of the discussion is fruitless because it does not take into account the varying aspects of the institutions under consideration. The purpose of this paper is very largely to consider the main objections to the initiative and referendum, and the extent to which these new instruments of democracy may be wisely employed under our system of government.

In the operation of the initiative and referendum there are three fundamental steps: (1) The drafting of the measure to be submitted; (2) the obtaining of initiative or referendum petitions, and (3) the submission of measures to a vote of the people. It will be well to discuss each of these steps separately.

The question of draftsmanship has been one of the most serious ones in connection with the initiative. Perhaps too much emphasis has been placed upon the value of discussion in legislative bodies, for we realize that the great bulk of our state legislation does not receive careful consideration by the bodies which enact it. It is true also that important measures are frequently drafted by individuals or organizations which have no official connection with legislative bodies. But legislative discussion is of much value, and one of the most hopeful movements in recent years has been that toward scientific draftsmanship of legislation. Any plan which will enable a small group of persons to force action by the voters upon legislative proposals, no matter how crudely drafted, is defective just to that extent. To this point it is not sufficient to answer that much legislation now enacted by legislative bodies is bad, and that the more important initiative measures in Oregon and elsewhere have been drafted with some degree of care. There must, in addition, be some guarantee that initiative measures shall receive serious consideration,

both as to form and as to substance, before being submitted to a popular vote.

But it seems possible that expert draftsmanship may be obtained under the initiative. It would not be improper, for example, to require that initiative petitioners obtain the services of some competent draftsman if they have not voluntarily done so. It is with respect to the subject of obtaining proper consideration of a measure before its submission to the people that the framers of initiative proposals in this country have made important advances. There are many possible ways of initiating proposed legislation. In the Swiss federal government a proposed constitutional amendment may, if it is desired, be presented in general terms, leaving the federal assembly to draw up a project in accordance with the sense of the petitioners; but this plan has not proven popular in Switzerland, and would put power in the hands of a legislature to defeat the popular demand by drafting a measure not in accordance therewith. Moreover, the proposers prefer definite measures to a general statement of principles.

The most popular plan of initiative in this country, and the one first adopted, was that of a popular initiation of a complete measure, usually by a petition of eight per cent of the legal voters, the initiated measure to be submitted directly to the people as a result of such initiation.<sup>1</sup> The next development in the form of proposing initiated measures is that of requiring such measures to be submitted first to the state legislature, with that body having an opportunity to enact the measure if it thinks proper, and if it does not think proper to do this, to submit to the voters a competing measure<sup>2</sup> upon the same subject, at the same time that the initiated measure is submitted. This plan, adopted in Maine, California and Michigan (under an advisory initiative for constitutional amendments), and proposed in Nevada, Washington and North Dakota, is open to the very serious objection that it complicates the issue submitted to the people. Under this plan some legislative action is forced, of course, and the competing measure has the advantage of legislative consideration, but the advantages of the plan are more than off-set by its disadvantages.

From the standpoint of proper draftsmanship and consideration

<sup>1</sup> The South Dakota amendment of 1898 required the legislature to enact such initiated measure and submit it to a vote of the electors of the state.

<sup>2</sup> In Maine apparently the legislature may submit the initiated measure merely with a recommendation that it be rejected.

before submission to the people, the proposals made in Wisconsin, Ohio and Illinois deserve most serious consideration. The Wisconsin proposal,<sup>3</sup> which must receive the approval of another legislature and be adopted by the people before it becomes effective, in reality does not provide for a popular initiative. It assumes, properly, that if any appreciable number of the people of the state wish to do so, they may obtain the introduction of their measure in the legislature. A petition of eight per cent of the qualified voters may then require the submission to the people of such a proposed law, either in the form in which it was originally introduced, or with any amendments thereto which may have been proposed in the legislature.

The plan recently proposed by the Ohio constitutional convention is more satisfactory in some respects than is the Wisconsin scheme.<sup>4</sup> Here a measure may be initiated in the legislature by a petition of three per cent of the electors, and if enacted in the form proposed it becomes effective, subject to a referendum upon petition. If the measure is not passed, or if no action is taken upon it within four months, or if it is passed in an amended form, its submission to the people may be demanded by a supplementary petition of three per cent of the voters (in addition to those signing the original petition), and such petition may demand the submission of the measure, either in its original form or with any amendment or amendments incorporated therein by either branch, or both branches, of the general assembly.

The Illinois plan<sup>5</sup> provides for initiation of a measure in the legislature by an eight per cent popular petition, and the initiated measure, unless enacted without change, is to be submitted to the people at the next general election, unless it should fail to receive the affirmative votes of at least one-fourth of the members elected to each house. This plan as proposed does not permit an improvement in the form of the initiative measure originally proposed, but permits the killing of any such measure which does not have some substantial support in the legislature, and also permits the legislature, if three-fourths of its members can agree, to enact a measure in place of that initiated, and to avoid a popular submission of the initiated proposal. It is probable that one-fourth of the members of each house could be found

<sup>3</sup> Beard and Shultz, *Documents on the State-Wide Initiative, Referendum and Recall*, p. 206.

<sup>4</sup> Proposed amendment to be submitted to the people of Ohio, September 3, 1912.

<sup>5</sup> Senate Joint Resolution No. 15. Passed Illinois Senate, April 20, 1911. Failed of necessary two-thirds vote in House of Representatives, May 3, 1911.

to support any meritorious proposal which a majority of such houses desired to defeat.

The Wisconsin and Ohio proposals preserve all the beneficial features of legislative consideration, and in reality give a greater possibility of scientific draftsmanship than do the ordinary processes of legislation. These plans meet one of the most serious objections to the initiative in its earlier form.<sup>6</sup>

With respect to the Wisconsin plan it should be noted again that no initiative petitions are provided for, and where, as in the Wisconsin and Ohio proposals, initiation is in the legislature itself, with a possibility of legislative consideration and amendment, it is not necessary that a large number of petitioners be required to initiate a proposed measure. The framers of the Ohio constitutional amendment, therefore, were wise in providing that three per cent of the voters might initiate a measure.

But conditions are entirely different when a measure presented by initiative petition must be submitted to a popular vote precisely in the form in which it is proposed. Under such conditions as these adequate safeguards should be provided to insure that a petition represents some well-defined sentiment in the state at large. Everyone is familiar with the ease with which signatures are often obtained to petitions, and a large proportion of such signatures usually represent no sentiment on the part of the signers. It is this fact that is responsible for the development of professional "signature-getters" in Oregon.<sup>7</sup> Yet, with all of this, the getting-up of large petitions is not an easy task, and the greater number of signatures do perhaps represent popular sentiment as definitely as does the subsequent voting upon the measures submitted to the people. It should also be remembered that if an initiative petition be required to be signed by eight per cent of the legal voters, the completion of such a petition

<sup>6</sup> Under any system of free proposal of measures by initiative petition, for submission to the people, it is possible that two or more measures dealing with the same subject may be proposed, and such measures may be directly contradictory, or merely conflicting in some of their terms. To meet this situation, the California constitutional amendment of 1911 provides that: "If any provision or provisions of two or more measures, approved by the electors at the same election, conflict, the provision or provisions of the measure receiving the highest affirmative vote shall prevail." Similar provisions have been adopted by a number of other states. Such a plan as this will probably lead to thoroughly unsatisfactory results, inasmuch as the measure so enacted would represent a composite of provisions, very likely not in harmony, and which in such form would probably not represent the views of the supporters of either measure. But the contingency here provided for is apt not to arise often, and under the Wisconsin and Ohio plans proposals conflicting as to some of their terms are not very apt to be submitted.

<sup>7</sup> Burton J. Hendrick, "Law-Making by the Voters," *McClure's*, Vol. 37, p. 436 (August, 1911).

is much more difficult and more expensive in a populous state like Illinois, where perhaps one hundred thousand signatures are required, than in Oregon, where ten thousand would be sufficient. Clearly the requirement of twenty-five per cent of the legal voters, as is proposed in Wyoming, is prohibitive, but for states of small population an initiative petition of more than eight per cent is desirable, if the initiated measure is to be submitted to the voters in the form in which initiated by petition. However, under the same conditions, eight per cent should be sufficient in a state as populous as Illinois. In my own opinion the better plan is one somewhat similar to those of Wisconsin and Ohio, with a very small initiative petition if any, but with the initiated measure submitted first to the legislature for consideration.<sup>8</sup>

For the referendum five per cent of the voters have usually been required. Here again the ease or difficulty of obtaining signatures depends in large part upon the number of voters, and while five per cent may not be too small for a populous state, it is perhaps desirable that a larger percentage be required in states of small population.

In order to make sure that the demand for legislation, or the demand for a referendum, is not merely local, there should be some provision which will prevent all signatures to a petition being obtained in some one section of the state. Such a requirement adds to the difficulty of getting up a petition, but should not be a serious burden, if properly devised. The Missouri constitutional requirement that an initiative petition be signed by eight per cent, and a referendum petition by five per cent, of the legal voters in each of at least two-thirds of the congressional districts of the state, is clearly too severe a restriction, but no objection can be made to the Wisconsin proposal that no more than one-half of the petitioners shall be residents of any one county.

Another question of great importance is that as to the verification of initiative and referendum petitions. An official verification of each signature, such as might be provided if signatures were required to be had at registration places, would make it necessary that the voter come to the petition, and would make it almost impossible to complete a petition, although every signature under such conditions would be fairly sure to represent the real opinion of the signer.

<sup>8</sup> Upon the subject of the size of petitions there are interesting discussions in *Equity*, XIII, 65; XIV, 18 (April, 1911; January, 1912).

The Michigan constitution of 1908 provides that advisory initiative petitions on constitutional amendments "shall be signed at the regular registration or election places at a regular registration or election under the supervision of the officials thereof, who shall verify the genuineness of the signatures and certify the fact that the signers are registered electors of the respective townships and cities in which they reside."<sup>9</sup>

The plan most employed in this country is that merely of a certification by the person circulating the petition, but this has come to be regarded as insufficient, and several states now by legislation provide in addition for a judicial determination of the sufficiency of a petition. The Wyoming proposal makes the requirement that to each petition "shall be attached affidavits by three separate qualified electors that each signature thereon is the signature of the person whose name it purports to be, and that to the best of the knowledge and belief of the affiant each of the persons signing said petition so verified, was, at the time of signing, a qualified elector."<sup>10</sup> The Montana legal provision that the registration officers shall compare the signatures upon the petitions with the signatures upon the registration books, is a good one,<sup>11</sup> as is also the California constitutional provision limiting the circulation of petitions to persons who are qualified electors of the city or county in which the signatures are obtained.<sup>12</sup>

The most important step in the initiative and referendum is the submission of the proposal to a vote of the people. And here attention should be called first of all to the desirability of submitting to popular vote only important questions of state policy. With respect to these institutions the most important point is that of devising some plan which will not burden the voter with a number of unessential and unimportant measures. Upon our success in this respect depends the ultimate usefulness of the referendum as an instrument of democratic government.

The policy of submitting state constitutional amendments to a vote of the people was adopted early in our history, and although the initiative and referendum for ordinary legislation have been adopted in a number of states, constitutional amendments still form the larger

<sup>9</sup> Michigan constitution of 1908, Art. xvii, Sec. 2.

<sup>10</sup> Beard and Shultz, 204.

<sup>11</sup> *Ibid.*, 131.

<sup>12</sup> *Ibid.*, 189.

bulk of measures submitted to popular vote. But calling a measure a constitutional amendment does not make it any the more important, and attention has frequently been called to the fact that the greater number of such proposals are really not fundamental in character.<sup>13</sup> The distinction in substance between constitutional provisions and statutes has largely broken down, and we have come to realize that many matters of statutory law are of more fundamental importance than is much of our constitutional legislation. Whether they be called statutes or constitutional amendments, only questions of state-wide importance should be submitted to a vote of the people of a state. Perhaps one desirable step in this direction would be to provide that constitutional amendments as to trivial matters need not be submitted to the people, unless such submission is demanded by a referendum petition.

Any specific limitation upon the number or character of measures of legislation submitted through the initiative and referendum must almost necessarily weaken these institutions as means of obtaining desired legislation.<sup>14</sup> But with plans such as those proposed in Wisconsin and Ohio, especially if combined with a requirement that any measure to be adopted shall receive say at least one-third of all votes cast in a general election, there is little danger of the voters being swamped by a great number of proposals.

A popular vote is of little value (1) if the questions submitted are so trivial or so local in character as not to be of interest to those to

<sup>13</sup> See my *Revision and Amendment of State Constitutions*, 269-271.

<sup>14</sup> There are, however, certain ways in which proper limits may be placed upon the submission of measures to the people. If the people by petition have the right to demand a referendum upon legislative acts, there is no reason why the legislature should be permitted of its own motion to submit its measures to a popular vote. If there is any demand for such a vote a referendum petition can be presented, and if there is no demand by petition for a referendum the legislature is simply shifting its responsibility for the measure by submitting it to the people; the result is harmful and the ballot is overburdened. Yet many of the initiative and referendum provisions permit such a practice.

The Nevada constitutional amendment of 1904 forbids the repeal or alteration of a referendum law except by another vote of the people. If measures adopted by a popular referendum may be repealed only in the same manner the number of proposals to be voted upon by the people must necessarily in the long run be materially increased, and such a requirement seems unnecessary. The requirement of a two-thirds vote of the legislature to repeal or alter a referendum law should be sufficient. For provisions in California and Washington (proposed) bearing upon this subject, see Beard and Shultz, 188, 193.

When a measure has been initiated by petition and rejected by a popular vote, it should not be possible to submit the same measure at the succeeding election. In Oregon the question of woman's suffrage was rejected in 1900, 1906, and 1908, but was submitted again in 1910. Oklahoma and Nebraska (proposed) provisions limit the power to resubmit questions at succeeding elections. Beard and Shultz, 139, 197. There is a more stringent proposal in North Dakota with respect to initiated constitutional amendments, *Ibid.*, 218.



whom they are submitted, (2) if the questions are so complicated and technical that the average voter has no satisfactory means of informing himself regarding them, or (3) if the questions are submitted in such great numbers that the voter, even if he might possibly render a satisfactory judgment upon any one of them, cannot inform himself regarding the merits of all the measures upon which he must pass.

It has already been suggested that many constitutional amendments submitted to the voters are local or trivial, and the same statement may be made of many legislative measures submitted through the initiative and referendum. But in general the legislative proposals so submitted have related to matters of general interest.

Most of our constitutions provide that a bill shall relate only to one subject, which shall be expressed in its title, and this places some limitation upon the complexity of legislative measures submitted to the people. But where the subject matter itself is technical or complex the voter is apt to be perplexed, and may receive little aid in deciding properly the question submitted to him. The voter is almost sure to have difficulties under the plan adopted in some states by which a measure may be initiated by petition and by which the legislature, if it disapproves of such measure, may submit a competing measure. The Michigan constitution contains such a plan with respect to constitutional amendments initiated by popular petition and provides that: "In case alternative proposed amendments on the same subject are submitted at the same election, the vote shall be for one of such alternatives or against such proposed amendments as a whole," and there is a somewhat similar provision in Maine with respect to legislative measures. This presents three alternatives to the voter, and makes it possible that neither proposal receive a vote sufficient to carry it, although the total affirmative vote for one or the other of the measures may be greater than the vote against both. To cover this case the Michigan constitution further provides: "If the total affirmative vote for such alternative proposed amendments is the required majority of all the votes for and against them, but no one proposed amendment receives such a majority then the proposed amendment which received the largest number of affirmative votes shall be submitted at the next regular election, and if it then receives the required majority of all the votes cast thereon it shall become a part of the constitution." There is

a somewhat similar provision in Maine. All provisions for competing or alternative proposals must necessarily be somewhat complex. The voter can with some intelligence answer yes or no upon one definite and concrete question, but few have the time and patience to deal successfully with two competing measures upon the same subject. And this difficulty alone is sufficient to condemn the plan of competing proposals.

Where proposals are complex some aid is of course furnished by the printed arguments which are distributed in Oregon, Oklahoma, California and Montana.<sup>15</sup> But under the Oregon plan, which has proven most effective, some measures always remain unargued, and the official arguments prepared in Oklahoma cannot have proven of much value to the voters. Upon the constitutional amendments submitted to the voters of California on October 10, 1911, some of the arguments were very well prepared, but their usefulness was diminished by the cumbersome form in which they were printed.

The Oregon plan of distributing printed arguments has pointed the way to a more effective method of educating the voter upon questions to be submitted to him, but such arguments will not prove effective if the measures submitted are numerous or technical. In Oregon the people have taken a great interest in questions submitted to them, even when so large a number as thirty-two measures were submitted at one time, but a large number of the measures submitted in Oregon since 1904 were important, the plan of submitting arguments (in 1906, 1908, and 1910) was a novel one, and the whole movement has not passed a somewhat experimental stage. It is hardly wise to assume that the great body of the voters of a state will continue to feel themselves competent to pass upon as many as thirty-two measures at each succeeding biennial election.

In the submission of measures to a popular vote much depends upon the ballot title, for an erroneous title may mislead voters into supporting something to which they are in reality opposed. In Oregon, Oklahoma and Missouri it is made the duty of the state attorney-general to provide a proper ballot title for a measure to be submitted to a referendum vote, and an appeal to the courts is allowed if anyone is dissatisfied with the title selected by that officer.<sup>16</sup> Yet those favoring a general woman's suffrage amendment succeeded in

<sup>15</sup> A similar plan is proposed in Washington and Ohio.

<sup>16</sup> Beard and Shultz, 86, 145, 174.

having it go on the Oregon ballot in 1910 as a "woman's tax-paying suffrage amendment, granting to taxpayers, regardless of sex, the right of suffrage." The voters were not misled, however, and defeated the proposal by a heavy vote.<sup>17</sup>

For some years we have been in the midst of a vigorous movement for a short ballot, and this movement has been founded on the well-known fact that if a great many officers are to be elected the voter cannot possibly vote with intelligence, because he cannot know the qualifications of all candidates who present themselves for office. The same statement holds when numerous measures are submitted to a popular vote. Each voter can be expected to have some intelligent notion regarding important public questions, but must necessarily be perplexed by a great number of measures, regarding some of which he may be almost completely ignorant.

Much is made by the opponents of the referendum of the fact that a great many measures are voted upon unintelligently and are carried by small minorities of the whole electorate. It can hardly be expected that even important measures will ordinarily obtain as high a vote as that cast for candidates in the same election. But if a measure is important enough to be submitted to the people, it should be possible to get a vote large enough to represent a real popular judgment. And in fact it should be said that important measures of state-wide interest do ordinarily receive such a vote.

It is not necessary that such a popular judgment be represented by a majority of all persons voting at a general election or by a majority of all the electors of the state. Indeed, such requirements are practically prohibitive, because of the fact already referred to that a larger vote can ordinarily be gotten for candidates than for measures. This is natural, not only because of the greater personal interest in candidates, but also because the machinery of our party organization is devised primarily for the purpose of polling a full party vote upon candidates. Measures submitted to the people are ordinarily not political issues between the parties.

However, some constitutional provision should be adopted to make sure that a referendum vote does represent a real popular judgment. The requirement of a majority of all votes cast at a general election is too severe. The requirement simply of a majority of those voting upon a given measure permits its adoption by a small minority

<sup>17</sup> Burton J. Hendrick in *McClure's*, Vol. 37, p. 442 (August, 1911).

of the voters and is therefore bad. The Michigan constitution of 1908 provided that a constitutional amendment initiated by popular petition in order to be adopted should receive a majority of the votes cast upon its adoption or rejection, and that the affirmative vote should not be less than one-third of the highest number of votes cast at the same election for any office. Similar plans have been proposed in Washington and Wyoming;<sup>18</sup> and in New Mexico a legislative act submitted to the referendum is not rejected unless forty per cent of those voting at the election cast their ballots against it.<sup>19</sup> Some such scheme as that adopted in Michigan seems not unreasonable for measures initiated by popular petition. The popular vote required for the adoption of such proposals determining, as it does to a large extent, the ease or difficulty of carrying a measure, has a reflex influence upon the number of measures proposed, for measures merely of local interest will not be proposed if the possibility of their adoption is slight.

Much of the voting upon measures is mechanical, especially when a number of propositions are submitted at the same time, but a similar mechanical type of voting goes on also with respect to candidates. Perhaps the most interesting illustration of mechanical voting is that furnished by the use of distinct ballots for the submission of measures to a popular vote. When measures to be voted upon are printed upon the official ballot, together with and after the names of candidates, they are overlooked by many voters. Where a separate ballot is employed for such questions the attention of the voters is attracted to a much greater extent. This fact is clearly brought out by the experience of Idaho. In the elections of 1900 1902 and 1904, proposed constitutional amendments were printed at the bottom of the official ballots where they were easily overlooked. In 1906 and 1908 proposed amendments were printed upon separate ballots, copies of which were handed to each elector; having the ballot in his hand the elector is apt to vote it, and the result is a larger vote upon measures. By this mechanical device Idaho almost doubled the proportion of the popular vote upon proposed constitutional amendments. The adoption of a separate ballot law by Illinois in 1899 raised the popular vote upon measures from twenty to fifty per cent of the vote cast in the elections.<sup>20</sup>

<sup>18</sup> Beard and Shultz, 194, 203.

<sup>19</sup> *Ibid.*, 235.

<sup>20</sup> C. O. Gardner, "Working of the State-Wide Referendum in Illinois," *American Political Science Review*, August, 1911.

Votes obtained in this manner are not entirely unintelligent, because the voter, when his attention is attracted, may have a basis for intelligent action. But certainly the voting is more or less mechanical, and many of the votes are simply meaningless counters, just as are many votes cast upon measures under the Nebraska plan by which straight party votes are cast for or against proposed constitutional amendments endorsed or opposed by the parties.

Another illustration of popular inertia and of mechanical voting is that presented by the fact that when several proposals are submitted to the people at the same time, a popular proposal will aid others submitted with it, and an unpopular proposal will have the opposite effect. There are a number of cases in which an unpopular measure has carried down to defeat other measures which, had they been submitted separately, would have been carried.<sup>21</sup> In many cases however, perhaps in the greater number of cases, the people have shown discrimination in voting when several measures have been submitted to them at the same time.

A most pernicious practice employed by those interested in defeating a particular measure is that of organizing a campaign to defeat all proposals submitted at the same time, it being easier to develop in many voters an indiscriminating opposition to all measures than to make a fight on the particular proposal opposed and on that alone. Then, too, the ballots of ignorant voters can be controlled more easily by such a plan. Of twelve measures submitted to the voters of South Dakota in 1910 all but one were defeated as a result of a general "vote no" campaign, and of nine constitutional amendments submitted in Missouri in the same year all were defeated in a similar manner. In these cases proposals to restrict the liquor traffic were responsible for the defeat of other measures.

Yet non-discriminating and mechanical voting is characteristic of all elections, whether on men or on measures, and institutions must be judged not alone by the defects which manifest themselves, but by the general results obtained through their operation. And the experience in this country with the initiative and referendum seems to indicate that we need these institutions as a part of our governmental machinery. Most of the arguments against the initiative and referendum are either arguments against some particular form in which they have been applied or against their too frequent

<sup>21</sup> See my *Revision and Amendment of State Constitutions*, 280-284.

use. Carefully devised plans, such perhaps as those of Wisconsin and Ohio, are not open to serious objection, and to argue that they bring about any fundamental change in our form of government is mere nonsense. Even in the form most open to criticism, as in Oregon, the initiative and referendum have proved themselves effective instruments for the maintenance of popular government. As to Oregon, it should be said in addition that the people have largely met any difficulties which may be presented by an unlimited initiative and referendum—they have developed the system of bringing arguments upon measures home to every voter, and have shown an intelligent and sustained interest in the questions presented to them. And the initiative and referendum are largely responsible for this reawakening of political interest on the part of the people of Oregon.

The initiative and referendum do not constitute a panacea for all our political ills. They are not of value as instruments for the enactment of all state legislation, or for the enactment of any great part of such legislation. They are of value as a means of forcing legislation which the people want, and of checking the action of the regular legislative bodies. Real popular control consists not in the people's passing upon every public question, but in their having power to pass upon every question upon which popular interest is sufficient to warrant such action.